Supreme Court, U. S.
FILED
JUN 28 1980
MICHAEL RODAK, JR., CLERK

79-2070

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

0.086 ACRES OF LAND

AND

NANCY KING,

Petitioner

vs.

DEPARTMENT OF TRANSPORTATION
OF
THE STATE OF GEORGIA

Respondent.

Robert W. Harrison, Jr.
Counsel for Petitioner
P.O. Box 400
Saint Marys, Georgia 31558

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1979

No. _____

NANCY KING, Petitioner

v.

DEPARTMENT OF TRANSPORTATION
OF
THE STATE OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI TO
SUPREME COURT OF GEORGIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Nancy King, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered on May 20, 1980 in 0.086 acres of land; and Kenneth L. Harrison; and Jean P. Harrison; and C.S.

Edwards; and James Larry King; and Unknown Heirs of Charles Butler v. Department of Transportation. That judgment finally denied Petitioner's Application for Writ of Certiorari to the Supreme Court of Georgia from an adverse decision by the Georgia Court of Appeals.

## OPINION BELOW

The Court of Appeals issued the only opinion in this case, copy of which appears in Appendix A at page 35. The trial court issued its order denying motion to dismiss, copy of which appears in Appendix B at page 43. The Supreme Court of Georgia denied Petitioner's Motion for Reconsideration and Petitioner's Application for Writ of Certiorari, copies of the Supreme Court's judgments appear in Appendix C

pages 44 and 45. The opinion of the Court of Appeals has not yet been reported.

## JURISDICTION

The judgment of the Supreme Court of Georgia was entered on May 20, 1980. The jurisdiction of this court is invoked under 28 USCS § 1257(3).

## QUESTIONS PRESENTED

In 1973, the Georgia legislature enacted Chapter 95A-6 of the Ga. Code which states in pertinent parts:

> (1) Where the owner or owners of such property, or any person having a claim against or interest in the same, are residents of this State, the petition and declaration shall be served upon such persons

personally and, in cases where such persons are residents of this State but not of the county in which such property is located, such service shall be by second original, as in other cases; (underlining supplied for emphasis) Ga. Code Ann. §95A-606(a).

(2) If the owner, or any of the owners, or any person having a claim against or interest in said property, shall be dissatisfied with the compensation, as estimated in the declaration of taking and deposited in

court, as provided in section 95A-605, such person or persons, or any of them shall have the right, at any time subsequent to the filing of declaration and the deposit of the fund into court but not later than 30 days following the date of the service as provided for in section 95A-606, to file with the court a notice of appeal, the same to be in writing and made a part of the record in the proceedings. (underlining supplied for emphasis) Ga. Code Ann. 95A-610.

(3) Upon the filing of said declaration of taking and the deposit into court, which deposit shall be made at the time the declaration of taking is filed to the use of the persons entitled thereto, of the sum of money estimated in the declaration by said condemning authority to be just compensation, title to said land in fee simple absolute, or such lesser interest as is specified in said declaration, shall vest in the condemnor and said land shall be deemed

to be condemned and taken for the use of the condemnor; and the right to just compensation for the same shall vest in the persons entitled thereto: Provided, however, that nothing herein contained shall be construed so as to deprive the property owner of due process of law as guaranteed to every such person by the Constitution of this State and of the United States. (underlining supplied for emphasis) Ga. Code Ann. 95A-605(b).

(4) All questions of law arising upon the pleadings

or in any other way arising from the cause, subsequent to the filing of the declaration of taking and the deposit of the fund, and subsequent to the filing of notice of appeal, if any, shall be passed on by the presiding judge who may, from time to time, in term or vacation, make such orders and give such directions as are necessary to speed the cause, and as may be consistent with justice and due process of law; but no jury trial shall be had except in open court. (under-

lining supplied for emphasis).

Ga. Code Ann. 95A-614.

The Georgia Court of Appeals held March 21, 1980 that Respondent was not required to personally serve Petitioner because she was not an owner of record and her interest was "unknown" to Respondent at the time the condemnation petition was filed and thus, service by publication was sufficient.

The questions thus presented are:

(1) Does service by publication on a Georgia resident claiming an existing interest in property to be condemned constitute a deprivation of property without due process of law as to violate the due process clause of the Fourteenth Amendment?

(2) Does service upon Petitioner's husband of the petition of condemnation and declaration of taking without summons containing the time within which Petitioner is required to appear and file appropriate defensive pleadings (notice of appeal) or any other appropriate process reasonably apprising Petitioner of the time within which Petitioner is required to file her notice of appeal constitute due process of law?

(3) Does service upon Petitioner's husband of the petition of condemnation and declaration of taking containing the clear and conspicuous language specifiying June 26, 1979 as Petitioner's hearing date without any summons or other directive requiring Petitioner to file her

notice of appeal at some time prior to June 26, 1979 constitute due process of law?

(4) Does Petitioner's "response" filed July 5, 1979 as allowed by the trial court constitute a timely notice of appeal?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the provisions of the Ga. Code Ann. 95A-605(b), 95A-606 (a), 95A-610, and 95A-614. Said provisions are set out verbatim in the section entitled questions presented.

This case also involves Section one of the Fourteenth Amendment to the Constitution of the United States which states:

"All persons born or naturalized in

the United States, and subject to the jurisdiction thereof, are citizen of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law". (underlining supplied for emphasis)

STATEMENT OF CASE

Petitioner is a Georgia resident.

The Georgia State Department of Transportation filed its petition against property owner, Mrs. Nancy W. King, petitioner herein, April 26, 1979.

The petition contained a prayer: "That the defendants named herein and all persons known and unknown who may claim or have an interest in said lands be required to appear at a time and place to be named by the Court and make known their objections, if any they have, their interest, ownership, or other rights in said lands and the proceeds thereof."

The Order and Judgement of the Court entered thereon April 26, 1979 contained a directive and requirement that the person in possession of the property surrender same to respondent, with further direction that "they are hereby directed to show cause before me at 10:00 o'clock a.m. on the 26th day of June, 1979, at Camden County Courthouse,

Woodbine why the possession of said property should not be surrendered to the Department of Transportation on a day certain, not later than 60 days from the date of said filing of the Declaration of Taking." (underlining supplied for emphasis)

A copy of said Order requiring persons in possession of the property to be and appear on June 26, 1979 was posted on the bulletin board at the Camden County Courthouse under certifcate by counsel for plaintiff, respondent herein.

The citation issued by the Clerk of Superior Court contained a directive for all persons having any interest in or claim against such property "to show cause before such Judge at Camden County,

Woodbine on the 26th day of June, 1979 at 10:00 o'clock a.m., why such prayer for immediate possession should not be granted." (underlining supplied for emphasis)

The petition, including the above order, was served on James Larry King, husband of petitioner, April 26, 1979. Such service did not include any process, summons, or other directive save and except only the Court Order and Judgment, requiring petitioner to be and appear in Court June 26, 1979, which she did! Petitioner was not personally served. (underlining supplied for emphasis)

Petitioner appeared at the time and place as directed by the Court in Camden Superior Court on June 26, 1979

when she laid claim to the property described in the petition.

On said June 26, 1979, with petitioner present in Court as ordered, the case was called and the Court entered its order granting a continuance until July 10, 1979 to allow time for the filing of objections to the taking by landowners.

On July 5, 1979, Petitioner filed a "response" (notice of appeal) to Respondent's declaration of taking which states in the pertinent part of the second defense:

> "The taking of said described land is without due process of law"

On July 23, 1979, Respondent filed

a motion to dismiss Petitioner's "response" upon the grounds that same was not timely filed. Both Petitioner and Respondent submitted briefs to the trial court concerning Respondent's motion to dismiss.

Petitioner's argument that the taking of Petitioner's property violated due process clause of the Fourteenth Amendment was presented again in Petitioner's brief.

On November 1, 1979, the trial court denied Respondent's motion to dismiss and the Georgia Court of Appeals granted Respondent's application for an interlocutory appeal. The Georgia Court of Appeals reversed and Petitioner's application for a writ of certiorari

to Supreme Court of Georgia was denied with two dissenting votes.

REASONS FOR GRANTING THE WRIT

The taking of petitioner's property without required notice violated Petitioner's Federal Constitutional rights of due process of law.

At the time of filing the declaration of taking and service upon the owner of record and those claiming an interest in the property in question, the Department of Transportation was required to personally serve all Georgia residents claiming an interest in said property. See Ga. Code Ann. §95A-606. At said time petitioner was a Georgia resident claiming an interest in said property. (underlining supplied for emphasis)

The record disclosed that petitioner was not personally served. The Court of Appeals erroneously held that because petitioner's interest in the property condemned was "unknown" to the condemnor at the time the condemnation petition was filed that service by publication was sufficient. See opinion of Court of Appeals p.39.

Construing Ga. Code Ann. §95A-606 in this manner drastically carves away a huge portion of the due process rights of personal service guaranteed to all Georgia residents. In future condemnation proceedings, the Department of Transportation may condemn property by personally serving only record owners of property. The Department of Transporta-

tion may safely rely upon this decision of the Court of Appeals and serve all other Georgia residents who may claim an existing interest in the property by publication. The ruling of the Court of Appeals gives the condemnor a blank check to later insist that the interest of all other Georgia residents was "unknown" at the time of the filing of the condemnation petition.

Under the Federal Constitution an individual's fundamental rights to notice and an opportunity to be heard are protected by the due process clause. This issue was passed on by the United States Supreme Court in Mullane v. Central Hanover Bank & Co., 339 U.S. 306 (1949). There the Court held that the notice

given violated due process. The Court stated at p. 314:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated...to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

The Court reiterated this position in later cases. Robinson v. Hanrahan, 409 U.S. 38; Schroeder v. City of New York, 371 U.S. 208; Walker v. City of Hutchinson, 352 U.S. 112.

In the case of Robinson v. Hanrahan, supra, this court held that notice by publication was not sufficient, under due process requirements, with respect to an individual whose name and address are known or easily ascertainable. (underlining supplied for emphasis)

The Georgia legislature intended that all Georgia residents having a claim against or interest in the property to be condemned be personally served. (underlining supplied for emphasis) Had the legislature intended that only owners of record and persons having a known interest in the property be personally served, the statute would have so stated. (underlining supplied for emphasis) Also, Ga. Code Ann. §95A-606 does not

limit those Georgia residents required to be personally served to those chosen and named in the condemnation petition.

Assuming arguendo, that the Georgia legislature intended that the condemnor personally serve only Georgia residents having a known interest in the property to be condemned, the due process clause would not allow the Georgia legislature to justify the ommission of personal service upon all who could, with reasonable diligence, be ascertained and found. Clearly, any investigation, which discovered that Petitioner's husband claimed an interest in the property to be condemned, would, with reasonable diligence, ascertain that Petitioner also claimed an existing interest in the property to be

condemned.

The Department of Transportation recognized this affirmative duty to personally serve all Georgia residents claiming an interest in property to be condemned and named petitioner's husband, James Larry King as a defendant to be personally served. Apparently, the condemnor did a casual investigation and learned that Mr. King was in possession of the property in question. The condemnor ended its investigation too early and erroneously assumed that no other Georgia residents claimed any interest in the property to be condemned. A more thorough investigation would have revealed that petitioner Mrs. King, a Georgia resident, also was in possession of said

property and claimed an interest in same. Mrs. King's interest in the property to be condemned, if unknown to the Department of Transportation, was only unknown because the condemnor compiled a vastly incomplete investigation.

Does the condemnor have the authority to arbitrarily and capriciously choose and name those who must be personally served and deny all other Georgia residents claiming an interest in said property their rights to due process? Surely the answer must be an emphatic no! The Federal Constitutional guarantees of due process of law that require that Mr. King be personally served also protect Mrs. King and require that she be personally served.

Mrs. Kings' response (notice of appeal) was timely filed. The time within which notice of appeal must be filed does not commence to run until proper service has been perfected. (underlining supplied for emphasis) See Ga. Code Ann. §95A-610. Therefore, the trial court's order denying the condemnor's motion to dismiss was correct.

The taking of petitioner's property without required notice additionally violated Petitioner's Federal Constitutional rights to due process of law by a patent ambiguity.

In the instant case the process served was clearly misleading and grossly insufficient. Petitioner's husband received the petition and declaration of

taking. Neither indicated the time by which Petitioner had to file her Notice of Appeal. However, the papers contained conspicuous language that specified June 26, 1979, as her hearing date. (underlining supplied for emphasis)

A New York Appellate Court in Schafran & Finkel Inc. v. M Lowenstein and Sons, Inc., 280 NY 164, 19 NE 2d 1005, reh. den. 280 NY 687, 21 NE 2d 196 held that to satisfy the Constitutional requirements of due process the notice should state where and at what time the party is to proceed and the consequences of his or her failure to act as the law specifies. The Petition of condemnation and declaration of taking clearly specifies Petitioners hearing date. However, both the petition of

condemnation and declaration of taking are void of any statement telling Petitioner of the consequences of her failure to act. In addition, the Supreme Court of Illinois in Griffin v. Cook County, 369 Ill 380, 16 NE 2d 906 held that the notice should be plain to understand. In the case at bar, the notice was so plain and understandable, that by following the directive of the court, Petitioner lost her right to appeal. It appears from the facts that the process served was not reasonably calculated to appraise Petitioner of the date by which her Notice of Appeal should have been filed.

Petitioner obviously relied upon the date of June 26, 1979. Several de-

cisions from the Georgia Courts hold that under such circumstances the defendant should not be penalized for her reliance. In Mutual Benefit Health & Accident Ass'n v. White, 48 Ga App. 146, 172 S. E. 92 (1933) where the process and summons specified one date while the hearing was actually held at an earlier time, the Court overruled the default judgment which had been entered. In addressing the issue of the process and summons, the Court stated that there was nothing to indicate that defendant should appear at an earlier time. And in a later case with very similar facts the Court held that:

> "where process directs defendant to appear at a term

> of Court subsequent to the term at which the case is properly returnable, he is entitled to rely upon the contents of the process and is protected by his obedience to it." Progessive Finance Co. v. Longleaf Lumber Co., 108 Ga. App. 555, 134 S. E. 2d (1963) at p. 65.

It is evident from the cases cited, that this Court in ruling upon the Georgia Court of Appeals decision can and should consider Petitioner's reliance on the date of June 26, 1979, which was conspicuously listed in the papers Petitioner's husband received.

Georgia's legislators provided an added measure of protection for condemnee's in Ga. Code Ann. Section 95A-614. This section provides that the Court shall:

> ".....make such orders and give such directions as are necessary to speed the cause, and as may be consitent with justice and due process of law." (underlining supplied for emphasis)

This statutory law gives the Trial Court authority to protect the condemnee, Petitioner herein. The Trial Court in its ruling for a continuance on June 26, 1979, actually exercised that power. In light of the insufficiency, indeed, lack of, process, service of process and the re-

liance of Petitioner on the conspicuous language which specified June 26, 1979, as her hearing date, the Trial Court acted properly and legally in overruling Respondent's motion to dismiss.

The notice given was clearly misleading and prejudicial to Petitioner and was by its very nature not reasonably calculated to appraise Petitioner of the date by which her notice of appeal should have been filed. Petitioner justifiably relied upon the date designated in the petition and declaration of taking and should not be penalized by denial of her constitutionally guaranteed right to a jury trial because of her reliance.

Surely the law of the United States has not revolved to the technical place

where a landowner, not legally trained, can be subjected to loss of property without legal notice and opportunity to appear before a jury of his or her peers to have the question of just and adequate compensation judically determined, particularly, when the property owner follows the directives of the court.

The fiber of the law would be considerably diminished if the State of Georgia is permitted to use its awesome powers to subdue and overcome a citizen of the State of Georgia owning property therein by acquiring same without proper notice to the owner and an opportunity to defend and challenge the amount of compensation arbitrarily determined by processes wholly in derogation of common law.

Moveover, the property owning, tax paying citizen would stand defenseless before Georgia trial and appellate courts if the state in allowed to sail on under the flag of proceedure while trampling to earth the time honored doctrine and constitutional requirement of substance.

## Conclusion

Wherefore, Petitioner respectfully prays that a writ of certiorari be granted so that petitioner can have her day in court by jury trial.

Respectfully submitted,

Robert W. Harrison, Jr.
Counsel for Petitioner
P.O. Box 400
Saint Marys, Georgia
31558

June 16, 1980

APPENDIX A

OPINION BELOW

THE COURT OF APPEALS OF GEORGIA

DEPARTMENT OF TRANSPORTATION v. HARRISON et al.

March 21, 1980

DEEN, Chief Judge.

An interlocutory appeal has been granted to review an order of the Superior Court of Camden County which denied the Department of Transportations' motion to dismiss appellees' "response" to appellant's declaration of taking. Held:

Appellant filed its declaration of taking against certain real property on April 26, 1979, and it was served on Kenneth L. Harrison, Jean P. Harrison, C. S. Edwards, and James Larry King. A hearing date was set for June 26, 1979,

the notice was posted at the courthouse, and it was published in a local newspaper on May 3 and May 10, 1979. Mrs. Nancy W. King apparently appeared at the hearing and laid claim to the property contending that she held title to the property under a warranty deed date May 7, 1979, and recorded May 17, 1979. On her motion, the trial court rescheduled the hearing for July 10, 1979. No transcript of the June 26, 1979, hearing appears in the record. On July 5, 1979, she filed a "response" to appellant's declaration of taking contending that she was the sole owner of the property, entitled to receive all compensation paid for the land, and sought a jury trial on the issue of compensation.

Clearly Mrs. King's "response" is an appeal. Code Ann. § 95A-610 makes it incumbent upon a dissatisfied comdemnee to file notice of appeal within thirty days after service of notice. Department of Transportation v. Brooks, 143 Ga. App. 872 (240 SE2d 163) (1977); Department of Transportation v. Massingale, 141 Ga. App. 70 (232 SE2d 608) (1977); Knight v. Department of Transportation, 134 Ga. App. 332 (214 SE2d 418) (1975). Code Ann. § 95A-606 provides:

"Upon the filing of the petition and declaration, the same shall be served in the following manner: (a) Where the owner or owners of such property, or any person having a claim against or interest in the same, are residents of this State, the petition and declaration shall be served

upon such persons personally and, in cases where such persons are residents of the State but not of the county in which such property is located, such service shall be by second original, as in other cases; . . . (g) In all instances, and in addition to the service hereinbefore provided for, the condemnor shall, at the time of filing the petition and declaration of taking, cause a copy of such proceedings to be posted on the bulletin board of the courthouse; and, in addition thereto, such advertisement shall be published in the official newspaper of the county in which such property is located, which notice shall describe the property taken, so as to identify the same, and shall give the name or names

of the owners of such property, or persons having an interest in or claims against such property, so far as the same may be known, and such notice shall be published in said newspaper once each week for two weeks subsequent to the filing of such petition and declaration." At the time of filing the declaration of taking and service upon the owners of record, the Department of Transportation was not required to personally serve Mrs. King because she was not an owner of record and her interest was unknown to the condemnee at the time the condemnation petition was filed. Therefore, service by publication was sufficient. Code Ann. § 95A-605(b) provides that upon the filing of the declaration of

taking and deposit into the court of the sum of money estimated in the declaration as just compensation, "title to said land in fee simple absolute, or such lesser interest as is specified in said declaration, shall vest in the condemnor and said land shall be deemed to be condemned and taken for the use of the condemnor; and the right to just compensation for the same shall vest in the persons entitled thereto." As the record shows that the condemnor complied with the statutory requirements, title vested in the Department of Transportation and an attempted conveyance to appellee after that date did not pass title or give appellee a right to compensation from the condemnor. Appellee's reliance upon Knight v. Department of Transportation, supra, is misplaced. In

that case, a property owner with an interest existing at the time the petition was filed had not been served.

Appellee's contention that she was entitled to file her appeal up to and including the date required by the statute for determination of the time of possession is without merit. Code Ann. § 95A-608 provides: "Upon the filing of a declaration of taking, the court shall have power to fix the time, the same to be not later than 60 days from the date of filing of the declaration of taking, as provided in section 95A-605, within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner...." This code section applies only to possession. The time for filing a notice of appeal is contained in

§95A-610 and is controlling in all cases where an appeal is desired. The advertisement contained a clear statement as to the right of appeal and the time allowed for an appeal.

Judgment reversed. Birdsong and Sognier, JJ., concur.

APPENDIX B

THE SUPERIOR COURT FOR THE COUNTY
OF CAMDEN, STATE OF GEORGIA

| | | |
|---|---|---|
| DEPARTMENT OF TRANSPORTATION | * | |
| Condemnor | * | |
| vs. | * | DOCKET NO. 79V-157 |
| 0.086 ACRES OF LAND; and KENNETH L. HARRISON; and JEAN P. HARRISON; and C.S. EDWARDS; and JAMES LARRY KING; and UNKNOWN HEIRS OF CHARLES BUTLER | * | |
| Condemnees | * | |

O R D E R

Condemnor's motion to dismiss having been presented and heard, same is hereby denied.

This 30th day of October, 1979.

s/ Gordon Knox, Jr.
Judge, Superior Court,
Camden County, Georgia

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 5/7/80

Dear Sir:

Case No. 36280, King v. Dept. of Transportation

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur. except Bowles & Marshall, JJ., dissent.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

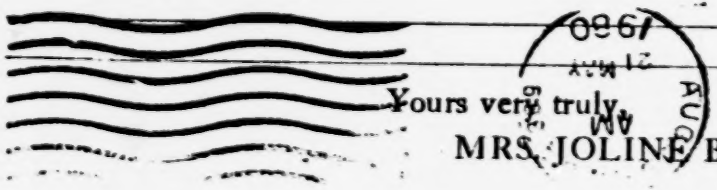
Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA 5/20/80

The motion for a ~~rehearing~~ reconsideration was denied today:

Case No. 36280. King v. Dept of Transportation

Bowles v Marshall, JJ., dissent




Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

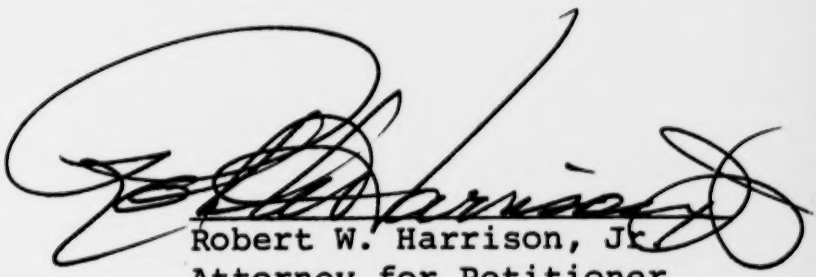
## Certificate of Service

I, Robert W. Harrison, Jr. attorney for Mrs. Nancy W. King, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on June 16, 1980, I served three copies of the foregoing Petition for a Writ of Certiorari to Supreme Court of Georgia by mailing same in a duly addressed envelope with first class postage prepaid to J. Thomas Whelchel, attorney for the Department of Transportation of the State of Georgia, to Dickey, Whelchel, Miles and Brown, Suite 301, First Federal

Plaza, Post Office Box 220, Brunswick, Georgia 31520.

All parties required to be served have been served.

Dated June 16, 1980.



Robert W. Harrison, Jr.
Attorney for Petitioner
P.O. Box 400
Saint Marys, Georgia 31558